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No. 85-484

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JACK MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether an individual defendant, as distinct from a corporate defendant, may be held civilly liable for violating Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 407.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 763 F.2d 133. The opinion of the district court (Pet. App. 7a-16a), issued orally, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1985. On September 9, 1985, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 23, 1985. The petition was filed on September 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 19, 1977, the United States filed an action in the United States District Court for the Northern District of New York against Pollution Abatement Services of Oswego, Inc. (PAS), alleging continuing violations of Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 407, which prohibits the dumping of refuse material into navigable waters, or the depositing of refuse material on the banks of navigable waters where it is liable to be washed into them. The United States subsequently filed an amended complaint, adding as defendants H. Willard Pierce and Jack Miller, President and Vice-President, respectively, of PAS. PAS, a New York corporation, operated a liquid and solid waste disposal service for industrial users at a site contiguous to Wine Creek, a tributary of Lake Ontario. The United States, in its complaint, charged PAS, Pierce, and Miller with dumping refuse matter (oil, chemicals, and other pollutants) into Wine Creek. The complaint further charged that the defendants had been storing thousands of drums of highly toxic chemicals —including polychlorinated biphenols (PCBs), pesticides, and hydrocarbons—on the banks of Wine Creek (Pet. App. 2a-3a). The United States requested the district court to enjoin the defendants from further dumping and depositing refuse material and to enter a decree requiring the defendants to remove certain refuse material from PAS property and from the banks of Wine Creek.

2. The district court held that PAS, Pierce, and Miller violated Section 13 of the Rivers and Harbors Act (Pet. App. 7a-16a). The court found that refuse materials from the PAS facility were discharged into Wine Creek and were deposited on the banks of Wine

Creek where they were likely to be washed into the river. The court further found that Wine Creek and Lake Ontario were navigable waters. In discussing the liability of the two individual defendants, Pierce and Miller, the court (*id.* at 9a-12a) stated:

> During all the pertinent times involved in this case, the defendants, H. Willard Pierce and Jack Miller, were stock holders, directors and officers of [PAS].
>
> * * * * *
>
> The individual defendants, by reason of their respective positions and activities in [PAS], and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so.
>
> * * * * *
>
> The personal responsibility of the individual defendants arises out of the facts that demonstrate that they were in a position to control the activities of [PAS] in such a manner as to have in the first instance, not caused the pollutants to flow into the navigable water, and in the second instance, to have remedied the situation.
>
> The testimony shows that [PAS] is a small, closed corporation having, I believe four stock holders whose interests were divided into three thirty per cent interests with ten per cent interest going to the attorney * * *. By the very nature of the Corporation and its size, without the definite proof that we had, I think you would infer that there would be overlapping responsibilities of the officers and managers who were running the Company. It obviously was not so departmentalized as to either of the defendants, so that one of them would claim to be insulated from the prohibited conduct. [Citation omitted.]
>
> * * * * *

> The liability on the part of the defendants seems to be quite uncontrovertible.

In discussing the relief to be granted, the court noted the defendants' lack of technical and financial resources and the ensuing likelihood that the defendants would be unable to comply with a clean-up order. Thus, while stating that Pierce and Miller were "the responsible individuals" (Pet. App. 13a), the district court ordered the United States "to perform such operations as are immediately necessary" (*ibid.*) to halt the pollution of Lake Ontario due to the PAS facility. The court also ordered that a judgment be entered against the defendants, jointly and severally, for the cost of the clean-up operation, the dollar amount to be left blank until the costs of clean-up had been certified. The court further stated that the parties could address the issue of the reasonableness of the dollar amount of the cost of the clean-up at the trial of the permanent injunction. In March 1983, following the United States' clean-up operation, the district court entered the amount of $411,269.10 as the final judgment.[1] Prior to the certification of costs, PAS was dissolved by proclamation for nonpayment of taxes (see Pet. App. 4a n.2), leaving Pierce and Miller as the sole defendants. Pierce and Miller appealed the judgment.

3. The court of appeals affirmed. It characterized the sole issue on appeal as whether personal liability may be imposed upon the individual defendants (Pet. App. 4a), and added that the defendants had "mistakenly frame[d] the issue as whether corporate officers may be held civily liable for a *corporate* viola-

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[1] Pierce and Miller stipulated to the reasonableness of this figure as the amount expended by the United States to comply with the district court's order, obviating the need for a trial.

tion of the Act" (*id.* at 5a; emphasis added). The court of appeals held that individual corporate officers may be held personally liable for their own personal violations of the Rivers and Harbors Act. The court pointed out (Pet. App. 5a) that Section 16 of the Act, 33 U.S.C. 411 (emphasis added), expressly provides that "[*e*]*very person and* every corporation that shall violate" the statute shall be held criminally liable for such violation. The court then rejected the argument that civil penalties could not be levied under the Act, relying on this Court's decision to the contrary in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), involving a corporate defendant. The court of appeals reasoned that since Section 16, by its own terms, contemplated violations by both persons and corporations, and since civil remedies had long been imposed under the Act, it followed that a civil remedy could be imposed against individuals who violated the Act.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. Section 13 of the Rivers and Harbors Act, 33 U.S.C. 407, prohibits the discharge of any refuse into any navigable waters of the United States or any tributary of navigable waters. Section 13 also prohibits depositing any material on the banks of a navigable water or tributaries where it is likely that such material will be washed into navigable waters.

The only express statutory remedy for violations of Section 13 is contained in 33 U.S.C. 411 (part of Section 16 of the Rivers and Harbors Act), which

provides for the assessment of criminal penalties against "[e]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of section[] 407." This Court has, however, long held that the United States may obtain appropriate relief in a civil suit against a party who violates the Rivers and Harbors Act. In *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491-493 (1960), this Court held that courts may order injunctive relief to remedy violations of the Act even where it contains no express provisions for such injunctive relief. To hold otherwise, the Court stated, would "impute to Congress a futility inconsistent with the great design of this legislation." *Id.* at 492. Similarly, in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. at 201-205, the Court held that the United States could recover the costs of removing a vessel which had been carelessly sunk in navigable waters in violation of the Act. The Court there affirmed the Fifth Circuit's holding that "the United States may assert *in personam* rights—to injunctive or declaratory relief or damages—against those responsible." *Id.* at 193. In so ruling, the Court applied the principle that civil actions may be brought under penal statutes where "criminal liability [is] inadequate to ensure the full effectiveness of the statute which Congress had intended." *Id.* at 202. The Court in *Wyandotte* thus determined that Congress did not intend the "statutory remedies and procedures [expressly mentioned in the Rivers and Harbors Act] to be exclusive of all others." *Id.* at 200.

2. Here, as the court of appeals pointed out, petitioner does not deny that injunctive relief was ap-

propriate, and the sole issue is "whether personal liability may be imposed upon the individual defendants" (Pet. App. 4a). The court of appeals upheld the district court's determination that the two individual defendants, including the petitioner, personally violated the Section 13 prohibition against dumping refuse in navigable waters. The court of appeals stated that the liability of the petitioner "was bottomed on [his] personal involvement in the firm's activities" (Pet. App. 5a), and correctly ruled that "corporate officers who are personally involved in or directly responsible for statutorily proscribed activity" (Pet. App. 6a) may be held civilly liable. This conclusion necessarily follows from this Court's holdings, discussed above, that a party who violates the Rivers and Harbors Act may be held civilly liable for injunctive relief or for the costs of clean-up, and from the fact that 33 U.S.C. 411, by its own terms, contemplates violations both by corporations and by individual persons.

3. Contrary to petitioner's contention, the decision of the court of appeals does not conflict with the Fifth Circuit's decisions in *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-1301 (1976), or *United States* v. *Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310-1311 (1976). In *Sexton Cove*, the Fifth Circuit held:

> A corporate officer may not be held civilly liable for a *corporate* violation of the Rivers and Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form. The enforcement section of the statute

> [33 U.S.C. 406] does not provide that an officer of a corporation which violates Section 403 is personally liable on *any* subsequent civil judgment obtained against the corporation.[2]

526 F.2d at 1300-1301 (emphasis added; footnote omitted). Thus, as the court of appeals below correctly observed (Pet. App. 5a), the question decided by the Fifth Circuit was whether a corporate officer could be held liable for corporate violations of the Rivers and Harbors Act, regardless of his degree of personal involvement—*i.e.*, on a theory of derivative liability.[3] By contrast, the question in the present case is whether a corporate officer may be held civilly liable for *his own* personal violation of the Rivers and Harbors Act—*i.e.*, on a theory of direct, personal liability —where his personal accountability for the violations is " 'quite uncontrovertible' " (court of appeals opinion at Pet. App. 3a, quoting district court holding at

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[2] Thus, *Sexton* and *Moretti* involved 33 U.S.C. 403 and its enforcement section, 33 U.S.C. 406, rather than Sections 407 and 411. While not necessary to distinguish these cases from the instant one, we note that 33 U.S.C. 411—unlike 33 U.S.C. 406—covers not only those who violate the underlying statutory prohibitions, but also those "that shall knowingly aid, abet, authorize, or instigate a violation."

[3] That this is all the Fifth Circuit was addressing is further demonstrated by footnotes 19 and 20 (526 F.2d at 1300-1301) in *Sexton*, which also deal with such ipso facto liability, and by the fact that the court's opinion does not discuss the otherwise rather obvious question of why personal liability should be barred when the enforcement section at issue, 33 U.S.C. 406, applies to "persons" as well as "corporations." Moreover, it would have been odd, to say the least, for any court to hold that an individual is immunized from personal liability because he is an officer of a corporation which is being held liable. Nothing in the Fifth Circuit's decisions suggests that it contemplated such a holding.

Pet. App. 12a). There is, accordingly, no conflict between the holding below and *Sexton Cove* or *Moretti*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

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[4] *Moretti* was a companion case to *Sexton Cove*. The two cases were decided on the same day, and *Moretti* cites only *Sexton Cove* as authority and does not add to it. 526 F.2d at 1310-1311. Petitioner's argument (Pet. 6-8) that on the facts of those cases the Fifth Circuit could have dealt with the issue of direct, rather than derivative, liability does not gainsay the fact that it did not do so.

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